IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 109

FEDERAL POWER COMMISSION, *et al.*

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 212

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF INTERSTATE NATURAL GAS COMPANY, INCORPORATED, IN OPPOSITION.

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Statement.

So far as it goes, this respondent adopts the statement contained in the petition filed on behalf of the Federal Power Commission in No. 109.

In addition, it should be pointed out that the record in No. 733 October Term, 1946, was made in 1942 and that, therefore, certain facts alleged in the brief filed on behalf of the Federal Power Commission in support of its petition are inaccurate, viz.: Mr. Frank H. Lerch is not, and has not been for some years past, president of either Interstate Natural Gas Company nor Mississippi River Fuel Corporation or any Standard Oil Company (N. J.) affiliate —a fact whereof the Commission has had notice and knowledge; also, Standard Oil Company (N. J.) has recently disposed of all of its interest in Mississippi River Fuel Corporation (See Commission brief, p. 17). The affiliation between these two companies because of interests of Standard Oil Company (N. J.) no longer exists.

Since this brief is in opposition to all of the petitions arising out of the refund case (Nos. 109, 188, 209, 212), it is necessary to point out the interest, if any, of each of the petitioners.

The Federal Power Commission (herein referred to as the "Power Commission"), petitioner in No. 109, derives its authority, if any, in the premises from the Natural Gas Act of 1938 (c. 556, 52 Stat. 821, 15 U. S. C. Sec. 717, *et seq.*). The rate case instituted before it was finally determined in its favor by your Honorable Court in *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682 (rehearing denied October 13, 1947, 332 U. S. 785). Effective October 1, 1947, this respondent, Interstate Natural Gas Company (hereinafter referred to as "Interstate"), billed for its gas sales at the Power Commission prescribed rate (R. 18).

The Public Service Commission of the State of Missouri (hereinafter referred to as the "Missouri Commission"),

Petitioner in No. 188, represents only Missouri consumers receiving gas indirectly from Mississippi River Fuel Corporation (hereinafter referred to as "Mississippi") (R. 92); and the Illinois Commerce Commission (hereinafter referred to as the "Illinois Commission"), Petitioner in No. 212, represents only Illinois consumers receiving gas indirectly from Mississippi (R. 68). The Commission entered a rate order against Mississippi (4 F. P. C. 340) which subsequently was reviewed and remanded by the Court of Appeals for the District of Columbia (163 F. 2nd 433) and settled by stipulation on May 4, 1948. By said stipulation Mississippi gives effect to that portion of the rate order in the Interstate case accruing since January 20, 1946, the effective date of the Power Commission's remanded order against Mississippi (See Power Commission's petition and brief, p. 15n).

The Memphis Light, Gas and Water Division of the City of Memphis, Tennessee (hereinafter referred to as "Memphis"), petitioner in No. 209, purchases its natural gas requirements from Memphis Natural Gas Company (hereinafter referred to as "Memphis Natural"). Memphis is not subject to regulation and it claims a part of the fund awardable to Memphis Natural in its corporate capacity and not for distribution to any consumer in fact (R. 25-26).

While this brief is in response to all of the petitions filed in Nos. 109, 188, 209 and 212, Interstate does not thereby indicate that the petitions should be considered jointly. On the contrary, each petitioner should sustain its own burden in attempting to establish grounds for certiorari.

ARGUMENT.

I.

Jurisdiction.

Interstate objects, on jurisdictional grounds, to the granting of certiorari in No. 109 by the Power Commission; No. 188 by the Missouri Commission; and in No. 212 by the Illinois Commission.

a. Principles of Law.

Of long standing is the general rule that the jurisdiction of the Supreme Court can be invoked only by one having a personal interest in the litigation, and not merely an official one. *Smith* v. *State of Indiana ex rel. Lewis,* 191 U. S. 138, 148-149. And this interest must be such that not only will a benefit to policy result but one must stand to have property diminished, burdens increased or rights detrimentally affected by the order up for review. *McCandless* v. *Pratt,* 211 U. S. 437, 443, 445; *Farmers Loan & Trust Company* v. *Waterman,* 106 U. S. 265; *In Re Michigan-Ohio Boulevard Corporation,* 117 F. 2d 191 (C. C. A. 7); see *Barriger* v. *Louisville Gas & Electric Company,* 196 Ky. 268, 244 S. W. 690, 31 A. L. R. 1408, 1411. "The interest must be substantial, and a merely nominal party to an action cannot appeal." *Hamilton Trust Company* v. *Cornucopia Mines Company et al.,* 223 Fed. 494 (C. C. A. 9, 1915, cert. den'd 239 U. S. 641); *Ohio Contract Carriers Association* v. *Public Utility Commission,* 140 Ohio St. 160, 42 N. E. 2d 758, 759 (Ohio Sup. Ct., 1942). Aside from the position of the parties in respect of interest and

aggrievement, it also is necessary that a justiciable cause be presented to the court—not one asking for "a gratuitous advisory judgment" upon a matter which has become moot by supervening events. *Public Utilities Commission of Ohio et al.* v. *United Fuel Gas Company et al.*, 317 U. S. 456, 466. That the United States is seeking review, does not lessen the jurisdictional strictures (*United States* v. *Union Pacific Railroad Company*, 105 U. S. 263) unless there is some special statutory provision. See *United States* v. *Maria De La Paz Valdez De Conway et al.*, 175 U. S. 60, 69-70. Certainly an agency of a government department would have no greater rights.

In the light of the foregoing principles, Interstate respectfully submits that these petitions do not meet the required jurisdictional tests.

b. The Federal Power Commission.

The Power Commission has carried through successfully all that it set out to do and could do under its organic law,—i.e. the Natural Gas Act. That Act sets forth what the functions of that Commission are and what it may do. Its legitimate work in reference to the rates in controversy ceased on the final affirmance by this court of the rate determination.

The Power Commission stood no loss, nor did it stand to be detrimentally affected by the disposition of the fund. Its position was only an official one and that of a nominal party only since the matter of distribution of impounded funds was docketed as the appeal to the Circuit Court had been docketed. The most that could be said for the Power Commission is that it is interested in the policy involved. From the requirements of the situation of parties seeking

review set forth above, it is clear that the Power Commission has no standing in this Court. It seems clear, also, that the Power Commission, if it is to be heard at all, should stand in the position of *amicus curiae* because of its obvious general interest in the question involved. This is provided for adequately in your Honorable Court's Rule 28 which gives to the Commission the opportunity as of right to appear in such role.

The Power Commission does not represent the consumers as do local and state commissions. (See *Arkadelphia Milling Company* v. *St. Louis Southwestern Railway Company et al.*, 249 U. S. 134, 146.) The consumers are the ultimate distributees of gas and, as such, are bound inextricably with the distribution function. While protection of consumers at retail may have been the purpose of the Natural Gas Act, the means adopted were limited in scope and comprehended only the Commission's participation in the wholesale function.[1] The Act has no application "to the local distribution of natural gas or to the facilities used for such distribution * * *." Section 1(b), 15 U. S. C. 717(b). Indeed, no consumer even has standing before the Power Commission to complain of a rate over which it has jurisdiction. The jurisdiction to proceed on a rate case is given to the Power Commission only "upon its own motion

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[1] "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted were limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act but from the exceptionally explicit legislative record, and from this court's decisions." (*Central States Electric Co.* v. *City of Muscatine*, 324 U. S. 138 at 144.)

or upon complaint of any State, municipality, State Commission, or gas distributing company * * *."[2]

c. The Missouri Commission and the Illinois Commission.

Interstate does not assert that state commissions do not represent the consumers within their respective bounds. Beyond that, however, all of the principles set forth above in respect of a party's right to seek review are applicable.

It has been pointed out that these state commissions represent consumers who get their gas only through Mississippi in so far as this case is concerned. Consequently, it is the rate situation of Mississippi which is involved. Mississippi, as the Power Commission and the Missouri and Illinois Commissions admit (Commission brief, p. 15n; Stipulation, Appendix A to opposition brief of Mississippi;

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[2] Natural Gas Act, *supra*, Sec. 5(a), 15 U. S. C. Sec. 717d which provides in the part material here as follows:

"SEC. 5.(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: * * *"

Section 13, 15 U. S. C. Sec. 717*l* provides:

"SEC. 13. Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission."

Illinois Commission brief, p. 18n), has given effect to the Interstate rate reduction back to January 20, 1946, the date when the Power Commission's rate order against Mississippi was to be effective and the old rates found to be excessive were no longer of any effect. Thus, all distributing utilities in Missouri and Illinois who were supplied by Mississippi have received all benefits to which they are entitled under the rate reduction order against Mississippi. The funds impounded prior to that time in the court below represented money paid to Mississippi under the only legally effective rate then in force and free of any claim for reparations. (See *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 618; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Company*, 162 F. 2d 388 (C. C. A. 5).)[3]

It is apparent, therefore, that Mississippi's customers have gained all that they could have received—in the same manner and to the same extent if a stay had not been granted in the Interstate rate case and if Mississippi had, on January 20, 1946, put into effect and passed on the benefits of the wholesale price it paid to Interstate. It is earnestly contended, therefore, that the consumers represented by the Missouri and Illinois commissions have the right to receive their due from the utility distributors no

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[3] In this connection it should be noted that the Power Commission's own rules provide:

"No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order." (General Rules and Regulations of Federal Power Commission (Effective Jan. 1, 1948) Part 154.2, 12 Fed. Register 8598.)

matter what is the outcome of these causes. They could not have obtained any more had the Commission rate reduction orders never been contested. Thus benefited, questions as to their rights are no longer justiciable and certiorari should therefore be denied. In the matter of granting the stay and appending the condition of impoundment, thereto, the court below was exercising equity powers (*Inland Steel Company* v. *United States et al.*, 306 U. S. 153), and thus acting, your Honorable Court may consider this supervening fact. (*Public Utilities Commission of Ohio* v. *United Fuel Gas Company et al.*, 317 U. S. 456, 466.)

II.

The Merits.

The essence of each of the petitions is that it was error for the court below to apply *Central States Electric Company* v. *City of Muscatine* (324 U. S. 138) to the situation presented here. It is claimed that the court below felt compelled to apply that case; and that if it is applicable it should be overruled. Interstate will show that the result reached by the court below was proper, legally and equitably sound, and the only realistic result that could be reached by an equity court acting within its proper ambit.

a. What the Court Below Did.

It is apparent from a reading of the opinion below (R. 103-105, 166 F. 2d 796) that the Circuit Court after "A careful consideration of the opposing contentions, in the light of the undisputed facts" (R. 105) felt that its only course was to award to the pipeline companies privy to

the contracts with Interstate the amounts which they paid and that if others have rights in any part of the fund, it was not that court's duty "to search out or declare them" (*id.*). The court below merely cited the *Central States* case in a footnote and without comment. Thus it is clear that the contentions plus the facts really moved the court to its conclusion. The court did, however, preserve the rights, if any, in the distributive parts of the funds of others by stating that its action was without prejudice to such rights, if any.

Contrary to the erroneous contention of petitioners that the court below reached its result under a feeling of compulsion from the *Central States* case, the fact is that the court had the breadth of discretion in the premises given to an equity court of original jurisdiction (see Illinois Commission brief, pp. 22 *et seq.*) and in exercising this discretion it reached a result based upon a proper evaluation of facts, contentions, and equities (see Part "b"). Regardless of the dissatisfaction of petitioners with the *Central States* case, however, that case did propound one applicable principle which did not spring full grown from it alone. It is:

> A federal court as such has no rate fixing authority. 324 U. S. 138, 143.

This is no new pronouncement but has been the law for some time. *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264; *Newton* v. *Consolidated Gas Company*, 258 U. S. 165, 177.

It will be shown that the judgment of the court below was otherwise fully justified without any support from the majority view of the *Central States* case.

b. The Court Below Exercised Discretion.

The Natural Gas Act provides for court review in Section 19(b) (15 U. S. C. Sec. 717r(b), and by Section 19(c) (15 U. S. C. Sec. 717r(c)) it is provided that:

> "The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

This in effect means that it is within the court's discretion whether a stay will or will not be granted (*Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 9-11), and it also is within its discretion whether it will impose any condition—such as impoundment.[4] The reviewing court, therefore, is exercising equitable powers to which a great measure of discretion attaches. *Inland Steel Company* v. *United States*

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[4] In *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, this court, per Stone, J., stated (at 271):

"The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State R. Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *People's Nat. Bank* v. *Marye*, 191 U. S. 272, 287, 48 L. ed. 180, 187, 24 S. Ct. 68; see *Norwood* v. *Baker*, 172 U. S. 268, 294, 43 L. ed. 443, 453, 19 S. Ct. 187. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such substituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience. *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338, 77 L. ed. 1208, 1211, 53 S. Ct. 602. It may prescribe the performance of conditions designed to protect the rights of the parties pending appeal, *Hovey* v. *McDonald*, 109 U. S. 150, 157, 27 L. ed. 888, 890, 3 S. Ct. 136, or to protect temporarily the public interest while its decree is being carried into effect. See *Consolidated Gas Co.* v. *Newton* (D. C.), 267 Fed. 231, 273; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 66 L. ed. 538, 42 S. Ct. 264."

et al., 306 U. S. 153; *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364; see also dissent by Mr. Justice Douglas in *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138, 152.

The inquiry, therefore, must be to whether this discretion has been abused.

Conflicting claims arising out of rate determinations are similar to causes of action for restitution—a remedy equitable in origin and function. Cf. *Atlantic Coastline Railroad Co.* v. *Florida et al.*, 295 U. S. 301, 309. In that case it was stated: "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it * * *" (*id* at 310).

The case which best illustrates the breadth of discretion involved is *Inland Steel Company* v. *United States, et al.* (306 U. S. 153). In that case this court spoke of the discretion lodged in a court of equity in a case such as this in terms which indicate clearly that not only is the discretion as to the granting of a stay order with or without conditions very broad but also in such a way that, along with the authority of *Ford Motor Company* v. *N. L. R. B.* (305 U. S. 364), there is ample authority for the statement by Mr. Justice Douglas in his dissent in *Central States Electric Company* v. *City of Muscatine* (*supra*), that "* * * the federal court which has this fund has considerable discretion in its management. *United States* v. *Morgan, supra.* I fail to see how it abused its discretion in handing the fund over to the officials."

c. There Was No Abuse of Discretion.

Given the large measure of discretion lodged in the court below, it is proper to analyze briefly just how the court

exercised its discretion both in respect of applicable facts and applicable law.

(i) The Fund and Its Origin.

Beginning not later than July 30, 1943, Interstate deposited in the registry of the court below the monthly difference between payments under the old rates and those rates required by Power Commission order. These deposits continued through October, 1947. On bills rendered for gas purchased after October 1, 1947, Interstate gave effect to the Power Commission rate order. On final reckoning, it was determined that more money than had been impounded had been paid by the three purchasing pipe line companies, and Interstate admits this additional liability (R. 16-19). All these funds, "of which $1,320,978 is applicable to excess charges to Mississippi River Fuel Corporation; $581,721 is applicable to excess charges to Southern Natural Gas Company; and $328,095 is applicable to excess charges to United Gas Pipe Line Company [for account of Memphis Natural Gas Company] from June 15, 1943 to December 10, 1945; and $235,646 is applicable to excess charges to Memphis Natural Gas Company from December 10, 1945 through September, 1947," represent the difference between the attacked and the prescribed rates (R. 57-58).[5]

As indicated in the various petitions, all purchasing pipe lines were themselves "natural-gas companies" under the Natural Gas Act. Each has since passed through some form of rate determination:

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[5] The figures above quoted are from the Power Commission's answer in the court below. As a matter of fact, these amounts are $1,484,582.53, $688,156.71, $344,606.38 and $247,859.44, respectively (R. 110).

Memphis Natural, by a consent order, reduced its rates effective July 26, 1943. There now is a dispute as to what was promised in respect of future benefits arising from the Interstate rate order. There is no dispute, however, that the promise was prospective from some date subsequent to the Memphis Natural consent order. In 1946, Memphis filed schedules increasing its rates which were suspended and subsequently withdrawn. (Power Commission brief p. 15, note 10).

Southern Natural Gas Company stipulated as to a reduction on July 19, 1946 (Power Commission brief p. 15, note 11).

Mississippi, after remand to the Commission by the Court of Appeals for the District of Columbia, entered into a stipulation on May 4, 1948, settling its rate controversy (Power Commission brief p. 15 note 12), and rate schedules effecting said purpose were accepted by the Power Commission on July 20, 1948, reciting changed conditions entitling Mississippi to higher rates than those prescribed in the remand order. (See in the Matter of Mississippi River Fuel Corporation, F. P. C. Docket No. G-462, July 20, 1948—not yet published).

There is no dispute that the immediate obligors of Interstate were the above three pipe lines and that they directly paid to Interstate the funds now in dispute (R. 57). It is apparent, also, that the rate situation of each of these companies has not been clear for either all or a substantial part of the impoundment period. Either rates had recently been stipulated or else there at least was reason to request higher rates. The position of petitioners, however, is that the pipe lines paid Interstate the money collected mediately from consumers. How much of this, had the reduction been effective at once, would have stayed in the pipe line companies' hands is purely speculative and

dependent entirely upon the reasonableness of their rates at the times of collection.

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed." *Board of Trade* v. *United States*, 314 U. S. 534 at 546.

(ii) The Power Commission's Attitude.

The Power Commission, as contrasted with its counsel now taking an apparently contrary position, has recognized that within the constitutional regulatory scheme these pipe lines are entitled to the funds now impounded and owed to them.[6] While there is not strict contemporaneity between the Natural Gas Act and the pronouncement set forth in footnote 6, still the Commission's construction of the rights given is entitled to weight by the courts. *Great Northern Railway Company* v. *United States*, 315 U. S. 262, 275; Cf. *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 367.

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[6] "The cost of gas purchased by Mississippi from its affiliate, Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by $301,329. The prescribed rate has been stayed pending Court review and the excess revenues over the ordered rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the Court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. This cost of gas purchased by Mississippi is a 'commodity' charge, and when final judicial review validates the reduction, Mississippi should reduce its rates to the seven utility customers by the proportion of the volume of gas it sells to these utilities to the total volume of gas sales in the year of the final judicial decision." (F. P. C. Opinion No. 126, In re: Mississippi River Fuel Corporation, et al., Docket G-462, 4 F. P. C. 340 at 359; R. 74).

(iii) Any Other Result Would Require the Court to Engage in Rate Making.

It is well recognized that it is not part of the judicial process to engage in the legislative function of making rates. *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138, 143; *Central Kentucky Natural Gas Company* v. *Railroad Commission*, 290 U. S. 264; *Newton* v. *Consolidated Gas Company*, 258 U. S. 165, 177. Yet, if the court below had done what the petitioners contend should have been done, judicial rate making would have been the inevitable consequence.

All three of the purchasing pipe line companies make sales for resale as well as direct sales for consumption (R. 55-56). The former are regulable by the Power Commission, the latter by state authorities if appropriate state legislation to that end exists. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U. S. 507. With this situation, what could the court below do? If all of the claimed funds were handed out to so called ultimate consumers, the court, contrary to the assertions of petitioners, would be indulging in local law and would impinge upon local regulation—a fact really recognized in the Power Commission brief (p. 10n). This is indisputable since some of the funds result from sales that are only regulable by states. Therefore, the court below would have had to make an allocation of the fund. But how? On what basis can it do so without engaging in a rate making function? It must be emphasized that each pipe line company paid Interstate the total purchase price for *all* gas regardless of who ultimately would use it. Therefore, the fund represents amounts paid for federally-regulable as well as state-regulable gas sales. Thus, to give to each consumer his just due, assuming his right thereto,

would inevitably require an allocation not only of the jurisdictional factors but also an allocation of that part of the fund paid by each purchasing pipe line company. It would entail an entry into a myriad of questions of fact and none of law. *Cf. Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581, 590. To make such an allocation would require the determination inter alia of a return to which each pipe line was entitled from its direct state-regulable sales and thus a determination of the proper state rate. This may not only be required for the whole impoundment period but requirements of justice and equity might require it for each of the forty months in which payments were made into the registry of the court. Considering these factors, there is no way of telling how much any consumer is entitled to without valid and complete rate determinations. Also, it would be necessary to determine the extent of every state's exercise of its authority not only to regulate the direct sales within its jurisdiction but also to award reparations therefor. On none of these was the court below advised. Conceivably, if the court below had awarded the fund to all consumers, a pipe line company might find itself mulcted further but for the same sales by a subsequent award of reparations by a competent state agency.

Bearing in mind that a federal court may not engage in rate making because it is not a judicial power and in state-regulable matters because it is a function reserved to the states (*Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 271), it would be hopelessly impracticable and unfair, as well as an usurpation of legislative and state functions for a court as an incident of review to enter the uncertain field of rate determination. See *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U. S. 315, where

Mr. Justice Cardozo, in respect of restitution awards after a rate determination, stated at p. 318:

> "The present record does not satisfy us that a new scale should be set up to govern claims for restitution. The field of inquiry is one in which the search for certainty is futile. Opinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates. There is a zone of reasonableness within which judgment is at large."

(iv) Conclusion as to the Exercise of Discretion.

It seems clear that the court below had only the course which it adopted in the management of the fund. Faced with the facts that the three pipe line companies paid the money to Interstate; that only these companies were in privity with Interstate; that Interstate would not secure any benefits from the impoundment; that some of the sales by the pipe line companies were subject only to state regulation if at all; and that it could pass on any interest in the fund beyond these companies only by indulging in the non-judicial and extra jurisdictional activity of federal and state rate making, it seems clear that the court exercised not only sound discretion but acted in the only manner consistent with the applicable law and the realities of the situation.

The court below acting as a court of original jurisdiction was sensitive to its responsibilities of staying within its proper federal and judicial bounds and to exercising a jurisdiction consistent with the practicalities of the situation. Its judgment, therefore, was the proper one in the premises.

III.

Conclusion.

Reduced to the simplest terms, petitioners are dissatisfied with the fact that a stay order operates effectively to suspend a Power Commission rate order pending review. The granting of such stay, however, with or without the condition of impoundment, is a matter of equitable grace (*Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 9-11; *Central Kentucky Natural Gas Co.* v. *Railroad Commission* 290 U. S. 264). The complaint that downstream customers are, by the stay device, deprived of the benefits of a wholesale rate reduction is speculative and one in which speculation could never be reduced to certainty without transgressing the judicial and federal functions. To the assertion that the action of the court below encourages frivolous review because a subsidiary or affiliate may benefit thereby and may pervert the intention of Congress in enacting the Natural Gas Act to protect ultimate consumers, the answer is contained in the power of the court to refuse to grant a stay if unsubstantial grounds of error are alleged, in the principle that equity may change the stay order (see *Arkadelphia Milling Co.* v. *St. Louis Southwestern Railway Co. et al.*, 249 U. S. 134), and in the fact that the court below in granting the stay reserved jurisdiction to cancel or modify the stay order for the protection of the real parties in interest (R. 2).

There is no conflict between the decision now challenged and those of this Court or any other circuit court of appeals. Nor has the court below decided any important matter upon which this Court should pass. On the contrary, the Court below has exercised its powers only in accordance with

well accepted principles pronounced by this Court and within the practicable limits of equity jurisprudence. We therefore respectfully submit that all of the petitions for certiorari in this matter should be denied.

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